No. 95-1295

(3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

DAYTON AREA VISUALLY IMPAIRED PERSONS, INC., an Ohio non-profit corporation; WAYNE COUNTY FOSTER PARENTS NETWORK, an unincorporated Ohio non-profit association; OHIO TELEMARKETING ASSOCIATION, INC., an Ohio non-profit corporation,

Petitioners,

v.

BETTY D. MONTGOMERY,* Attorney General, State of Ohio; J. ANTHONY SAWYER, City Attorney of the City of Dallas, Ohio; LEE FALKE, Prosecuting Attorney, Montgomery County, Ohio,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' REPLY TO OHIO ATTORNEY GENERAL'S BRIEF IN OPPOSITION

BARRY A. FISHER
Counsel of Record
DAVID GROSZ
FLEISHMAN, FISHER & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(310) 557-1077

RICHARD B. SAPHIRE
c/o University of Dayton
School of Law
300 College Park
Dayton, Ohio 45469
(513) 229-2820

Counsel for Petitioners

LOUIS A. JACOBS
4905 Stonehaven Drive
Upper Arlington, Ohio 43220
(614) 549-5690

*Substituted for Lee Fisher pursuant to Sup. Ct. R. 35.3.

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I. DISCRIMINATION AGAINST THE SPEECH OF SMALL AND UNPOPULAR CHARITIES.

The State[1] attempts to efface the importance of the first question presented by ignoring the issue. Yet the issue persists.

The State makes no effort to dispute, for example, that Ohio's charitable solicitation statute imposes a costly and intrusive regulatory scheme on the small or unpopular charities that must rely on outside professional fundraisers, while allowing established and popular charities to run an identical campaign with far less scrutiny and expense. (*See* Pet. 14-15.) Nor does the State dispute that the Court has expressly left open the constitutionality of such discrimination, *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 802 n.14 (1988), (*see* Pet. 13); nor does it respond to the point that the skewed playing field that results from heavy-handed regulation of outside fundraisers with no regulatory counterbalance for inside fundraisers who speak the same words is widespread among the States, (*see* Pet. 11 n.4).

The Court has observed that burdens on professional fundraisers "necessarily discriminate[ ] against small or unpopular charities." *Riley*, 487 U.S. at 799. This is a case, therefore, about State discrimination against unpopular

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[1] The only Brief in Opposition [Br. Opp.] to the Petition for Certiorari [Pet.] has been filed by Betty D. Montgomery, the Ohio Attorney General. The Attorney General was also the only party who actively defended the statute in the courts below.

speech. Whether such a scheme draws enhanced scrutiny is a question meriting review. (*See* Pet. 16-17.)

The favoritism of the Ohio statute is stark. Indeed, the entire scheme of regulation of outside professional fundraisers has no counterpart for charities with inside professional fundraisers. (*See* Pet. 6-9.)[2]

The State's principal claim is that organizations that raise less than $25,000 are not covered by the statute. (Br. Opp. 4-5.) The argument is a non sequitur since it does not address the central point – the differential regulation,

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[2] The latter, for example, do not need to give the names and addresses of staff, disclose internal financial arrangements, or publish individuals' criminal records. The former must do all these things. *See* Ohio Rev. Stat. § 1716.07(B).

Groups using outside fundraisers must come up with a $25,000 bond, § 1716.07(C), a costly item that may also be difficult to obtain. Groups with in-house professional fundraisers need no such thing. The same is true for the detailed "solicitation notice" that outside fundraisers are required to file. § 1716.07(D). Inside fundraisers need not disclose any of the seven categories of information contained in this document. They are also exempted from post-campaign financial reporting of § 1716.07(E).

Only outside professional fundraisers must keep enormous quantities of records, § 1716.07(G)(1), and submit to onerous requirements when tickets are sold, § 1716.07(G)(2). Criminal records can prohibit people from working for outside, but not inside, fundraisers. § 1716.07(I). Outside but not inside professional fundraisers must engage in state-imposed cost accounting, § 1716.08(A), and disclosure, § 1716.08(B). Outside but not inside fundraisers must obtain written consents from other organizations, § 1716.08(C), and comply with detailed regulations regarding donation of tickets, § 1716.08(D).

with all that it entails, of groups using inside fundraisers versus those using outside fundraisers. (*See* Pet. 15 n.6.)

The State's attempt to justify the statute under strict scrutiny fails. It asserts: "The principal classification – between new and established charities – is narrowly drawn to meet the compelling interest in preventing fraudulent solicitation." (Br. Opp. 5.) As the Plaintiffs have shown, (*see* Pet. 18-19), this formulation at once demonstrates that strict scrutiny is being applied in name only, and that the classification cannot survive strict scrutiny in fact. The notion that "new" charities – even given the State's tacit reading out of *Riley*'s "unpopular" charities – are categorically more prone to "fraudulent solicitation" is unjustified speculation. *Cf. Larson v. Valente*, 456 U.S. 228, 248-51 (1982) (rejecting State's "assumption" that religious organizations that receive more than half their funds from the public are more likely to engage in "abusive solicitations of the public").

At bottom, as was the case in *Riley*, the State's assertion "amounts to little more than a variation of the argument rejected in *Schaumburg* and *Munson* that the provision is simply an economic regulation with no First Amendment implication, and therefore must be tested only for rationality." 487 U.S. at 790. Now, years after *Riley*, however, Ohio and other States continue to enact legislation based on just such premises. It is time once again to make clear that such "regulation burdens speech, and must be considered accordingly." *See id.*

II. FAVORING OF RELIGIOUS SPEECH.

As Plaintiffs have noted, the religious exemption in the statute raises significant issues of accommodation of religion – issues that lie at the roiled confluence of *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), and *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). (*See* Pet. 19-20.) The State's response, citing *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), is that the "statutory exemption applies to secular and religious organizations alike." (Br. Opp. 7). *Walz*, however, does not solve the problem. The State fails to account for the fact that the religious exemption is the statute's *only* per se exemption; all the others are based on some functional or operational characteristic. (*See* Pet. 20-21.)[3] Indeed, the sales tax exemption in *Texas Monthly* did not apply only to religious periodicals either, but to a large number of other goods. The State also interposes no defense of the religious exemption's overinclusiveness even on the premise of accommodation. (*See* Pet. 21.)

III. COMPELLED SPEECH.

On the statute's compelled disclosures, the State relies almost entirely on dicta in a footnote in *Riley*, 487

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[3] *See* § 1716.03(B) (organizations that have already registered under § 109.24 and meet other criteria); § 1716.03(C) (educational institutions "when solicitation is confined to alumni, faculty, trustees, or the student membership and their families"); § 1716.03(D) (solicitations confined to organizations' members, employees, or trustees); § 1716.03(E) (I.R.C. § 501(c)(3) organizations with less than $25,000 in annual gross revenue).

U.S. at 799 n.11. (Br. Opp. 8-9.) But the Plaintiffs have shown that only an unwarranted *expansion* of these dicta – themselves controversial both on the Court and among commentators – can justify the Ohio statute. (Pet. 24-26.) Such proliferating regulatory overreaching in this First Amendment sphere is no "modest," (Br. Opp. 8), matter, but "compelled speech," *Riley*, 487 U.S. at 796, that may "hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent," *id.* at 799.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

BARRY A. FISHER
Counsel of Record
DAVID GROSZ
FLEISHMAN, FISHER & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(310) 557-1077

LOUIS A. JACOBS
4905 Stonehaven Drive
Upper Arlington, Ohio 43220
(614) 549-5690

RICHARD B. SAPHIRE
c/o University of Dayton
School of Law
300 College Park
Dayton, Ohio 45469
(513) 229-2820

Counsel for Petitioners

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